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No. 97-115

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MARGARET KAWAAUHAU AND SOLOMON KAWAAUHAU,
Petitioners,

vs.

PAUL W. GEIGER,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITIONER' REPLY BRIEF

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A. The Bankruptcy Court's Findings of Fact Were Not Held to be "Clearly Erroneous."

At this eleventh hour, Dr. Geiger seeks to retry this case before this Court. There was ample evidence before the bankruptcy court, including Dr. Geiger's testimony, Dr. Halford's expert testimony, and the state court trial testimony for the bankruptcy court to hold that the judgments in favor of the Kawaauhaus are non-dischargeable under 11 U.S.C. §523(a)(6). Dr. Geiger selectively cites to certain testimony before the bankruptcy court, ignoring the fact that the bankruptcy court, in light of the evidence before it, found his testimony not as credible as the other evidence. The court of appeals did not amend the bankruptcy court's findings. Absent a "very obvious and exceptional showing of error," the court of appeals was not free to re-evaluate the evidence present before the bankruptcy court. *Judge v. Prod. Credit Ass'n of the Midlands*, 969 F.2d 699, 700 (8th Cir. 1992). "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses and the "clearly erroneous" standard requires the appellate court to uphold any district court determination that falls within a broad range of permissible conclusions." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985), cited in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 400 (1990). Even if the evidence before the bankruptcy court could have been interpreted differently, the court of appeals was required to defer to the bankruptcy court's findings. *In Re LeMaire*, 898 F.2d 1346, 1349 (8th Cir. 1990). Further, the bankruptcy court's findings of fact were not challenged by Dr. Geiger below. The court of appeals' decision was based upon application of its interpretation of law to the bankruptcy court's findings of fact.

Notwithstanding the significant legal barriers to a re-trial on appeal of the factual findings and without burdening this Court with a complete redescription of all the evidence below,[1] the Kawaauhaus note two significant matters on which Dr. Geiger has mischaracterized the evidence.

1. The Evidence Before the Bankruptcy Court Showed that Dr. Geiger's Knowing Administration of Substandard Care Caused Mrs. Kawaauhau to Lose Her Leg.

Contrary to Dr. Geiger's statement that there was no evidence to show that his actions caused the loss of Mrs. Kawaauhau's leg (Respondent's Brief on Merits at 5), Dr. Halford testified at the bankruptcy court trial via deposition that:

> "When Dr. Geiger finally administered penicillin, the drug of choice, he gave it orally to her instead of intravenously. Dr. Geiger admits in his testimony at trial that he knew the use of oral penicillin was not the accepted standard of treatment, and that penicillin intravenously was the accepted treatment. The hospital records and Dr. Geiger's testimony indicate that he took Margaret Kawaauhau off of all antibiotics on January 11, 1983. *Dr. Geiger intentionally administered substandard care to Margaret Kawaauhau that necessarily resulted in advancing the infection in her leg, the loss of her leg, and permanent damage to her kidneys.*" (emphasis added) (Bankruptcy Trial Transcript at page 6 — admitting into evidence Dr. Halford's deposition taken for the bankruptcy court trial affirming his affidavit). (Halford Deposition (Bankruptcy Court Exhibit No. 3) at 6, Exhibit B).

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[1] Note that in their brief on the merits, the Kawaauhaus cite only to the bankruptcy court's opinion while in his brief Dr. Geiger goes behind the findings to the record itself.

The record below is replete with references to evidence of Dr. Geiger's actions. Dr. Geiger testified that he knew the appropriate standard of care, but that he failed to prescribe it; (State Trial Transcript at 38, 40 (Bankruptcy Court Trial Exhibit No. 1)) notwithstanding the fact that he knew that Mrs. Kawaauhau was in grave danger. (Bankruptcy Trial Transcript at 73).

2. The Bankruptcy Court Did Not Believe Dr. Geiger's Rationalization of His Actions on the Cost Theory.

The bankruptcy court found that Mrs. Kawaauhau denied ever having discussed the cost of treatment with Dr. Geiger and Mr. Kawaauhau testified that he had never told Dr. Geiger to keep costs to a minimum in treating Mrs. Kawaauhau's leg. (FN 1, Pet. App. at 15). Furthermore, Dr. Halford testified that:

> [C]ost has a role in what we choose if you have an alternative that is more economically feasible, but cost should have no role in directing your therapeutic efforts when you are dealing with life and death. And to me, that was a gross error that was being made by being concerned about several hundred dollars versus the loss of life and limb. (Pet. App. at 6).

While Dr. Geiger can point to his own statements in the record below to justify his decisions, he adduced no corroborating evidence. The bankruptcy court rejected his testimony.[2]

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[2] Even if this Court were to retry the facts, it is difficult to see how the difference between $4 per day and $40 per day in medication would have been a significant factor to someone already bearing the expenses of a hospitalization with a "life threatening condition." This insignificant cost difference obviously was not a factor to the physicians to whom Dr. Geiger assigned care while he left town to "attend to other business" and who finally prescribed the correct medication and whose decision Dr. Geiger reversed. (Pet. App. at 20).

B. Dr. Geiger's Suggestion that the Enactment of the Exception Under §523(a)(9) Supports His Interpretation of §523(a)(6) is Unfounded.

Dr. Geiger cites the enactment of §523(a)(9) by the 98th Congress as a demonstration of the 95th Congress' intent to require only intentional torts to be excepted from discharge under §523(a)(6).[3] (Respondent's Brief at 16). However, the action of a later Congress does not imply the intent of a previous Congress. *Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 117-18 (1980).

In addition, the enactment of the "drunk driving" exception under §523(a)(9) is irrelevant to the interpretation of the language "willful and malicious" in §523(a)(6). The §523(a)(9) exception was designed to deal with circumstances not presented here. Dr. Geiger suggests that the interpretation proposed by the Kawaauhaus would make §523(a)(9) superfluous. Dr. Geiger is incorrect in this supposition because while he stretches to draw an inference from Senator DeConcini's statement, the most that can be said is that Congress, concerned over debtors who sought to discharge injuries resulting from driving while intoxicated, wanted to allow victims of such incidents to have an irrebuttable presumption that their debts were excepted from discharge. Such a presumption would not otherwise exist under any other provision of §523(a).

The peril of pointing to a single congressman's comments in a voluminous record is demonstrated by the fact that the amendment which Senator DeConcini proposed was not adopted and one proposed by Senator Danforth was passed as §523(a)(9). In

[3] For a discussion of Congressional intent (or the lack of it) in relation to the Bankruptcy Reform Act of 1978 and the "willful and malicious" exception, *see* Charles Jordan Tabb, "*The Scope of the Fresh Start in Bankruptcy: Collateral Conversions and the Dischargeability Debate*," 59 Geo. Wash. L. Rev. 56, 76 (1990).

describing the reason for this modified version of the bill, Senator Heflin stated:

> Under existing law, a debt is nondischargeable only if the debt is as a result of a "willful and malicious injury" to the person or property of another. In most states, the act of a drunk driver is grounded in negligence and is thus dischargeable. By making such debts non-dischargeable, we can protect victims of the drunk driver and deter drunk driving. Cong. Rec. S. 5362 (daily edition April 27, 1983).

Accordingly, Congress' intent was not to tinker with the definition of "willful and malicious," but rather to deter driving under the influence and to establish a separate category of a non-dischargeable debt which otherwise might be considered simple negligence under state law and therefore be dischargeable.

C. Where a Word Used in a Statute Has Both a Legal Meaning and Plain Meaning, Congress is Presumed to Have Used the Legal Meaning.

Dr. Geiger argues that the "plain meaning" of the words in question supports his position. But this Court acknowledged the "legal meaning" of the word "malicious" in *Tinker v. Colwell*, 193 U.S. 473, 485-86 (1904). When a statute employs a term with a specialized legal meaning relevant to the matter at hand, that meaning governs. *Moskal v. U.S.*, 498 U.S. 103, 121 (1990) (Scalia, J., dissenting). *See also, Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 321 (1992). As Justice Jackson explained for the Court in *Morissette v. United States*, 342 U.S. 246, 263 (1952):

> "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use

will convey to the judicial mind unless otherwise instructed. In such a case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as departure from them."

Justice Frankfurter more poetically put it: "[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings its soil with it." *Some Reflections on the Reading of Statutes*, 47 Colum.L.Rev. 527, 537 (1947).

D. Congress Must Act in the Manner Set Forth in the Constitution.

Even if this Court accepts Dr. Geiger's argument that the statements in the legislative reports evidence an intent of Congress to overrule *Tinker*, this intent, without more is ineffective. Our Constitution sets forth the process by which Congress may make laws. The only way to change the meaning of an existing statute is to change its wording. There is no other means by which Congress may constitutionally act. *INS v. Chadha*, 462 U.S. 919, 951 (1983) ("legislative power of Federal Government [must] be exercised in accord with a single, finely wrought and exhaustively considered procedure"). "Legislative intention, without more, is not legislation." *Train v. City of New York*, 420 U.S. 35, 45 (1975).

III. CONCLUSION

Dr. Geiger's efforts to retry the case before this Court and mischaracterize subsequent legislative history and rules of construction is not persuasive. The Court should grant the relief requested by the Kawaauhaus.

Respectfully submitted,

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